APPEAL NO. 93644

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on March 26, 1993, and continued to June 21, 1993, with (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) failed to timely dispute, pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (TWCC Rule 130.5), the certification of maximum medical improvement (MMI) and impairment rating (IR) (TWCC Form-69) of his treating doctor and that the claimant therefore reached MMI on April 20, 1992, with a whole body impairment of eight percent. He also determined that the claimant only sustained an injury to his right hip on (date of injury). The claimant appeals urging that the attorney representing him at the time filed an amended Employee's Notice of Injury (TWCC Form 41) and a request for a "Pre-Hearing" on September 8, 1992, and that he, the claimant, believed at time that he, the attorney, disputed his MMI and IR. He also urges that he can not read or write and therefore his receipt of a TWCC Form-69 from his treating doctor cannot be construed as notice. He also states that the carrier had paid for some treatment of his back and therefore accepted liability and that a designated doctor was appointed by the Commission in April 1993 (after the original hearing was convened) and that his report, which determined that MMI had not been reached, should be adopted. Respondent (carrier) argues that there is sufficient evidence to support the hearing officer's determination that the claimant had not timely disputed the MMI and IR of his treating doctor and that claimant's only injury on (date of injury), was to his hip and not his back and that the carrier did not accept liability for any back injury although it did cover medical testing and treatment to determine the origin of any back problem.

DECISION

Finding the evidence in the record sufficient to support the decision of the hearing officer, we affirm.

It was not disputed that the claimant sustained a serious hip injury on (date of injury), that he subsequently had surgery followed by therapy and that he was determined to have reached MMI with an eight percent IR by his treating doctor on April 20, 1992. There is evidence in the record that the claimant was diagnosed as having degenerative disc disease of the lumbar spine in addition to the injury to his leg and hip. Medical records from claimant's treating doctor, (Dr. T), indicate that after the successful hip surgery, the claimant continued to complain of pain in the right hip, back and lumbar region. In November 1991, Dr. T took X-rays and notes that claimant had "some arthrosis with no evidence of fractures." Dr. T subsequently certified MMI and an IR of eight percent on April 20, 1992. The carrier began paying impairment income benefits based upon the treating doctor's report. The record shows that an attorney began representing the claimant in September or October 1991 and apparently continued to represent him (although the claimant expressed dissatisfaction with his performance) until he, the attorney, withdraw his representation in a letter dated October 22, 1992. In any event, even though the treating doctor's certification of MMI and IR was sent to the attorney

representing the claimant by the carrier's counsel on July 8, 1992 (there is no evidence as to whether any copy was sent to either the claimant or his attorney earlier than July 8, 1992), neither the claimant or the attorney disputed Dr. T's certification. The claimant first gave notice to the Commission on October 23, 1992, that he was disputing Dr. T's certification of MMI and IR, some 107 days between July 8, 1992, through October 22, 1992.

A carrier requested doctor (Dr. B) examined the claimant in July 1992 and agreed with Dr. T's determination. The claimant was subsequently seen by other doctors, one of whom (Dr. P) indicated that he believed that the claimant had a right lower extreme radiculopathy from a low back injury as well as a right hip fracture and recommended further evaluation with a myelogram/CT scan. Dr. B subsequently saw the claimant on April 7, 1993, and stated that he had:

> . . . reviewed the report of [Dr. P], as well as the report of the myelogram done recently, since no MRI is possible to be done, given the presence of the metal to the right hip. I feel that no further diagnostic tests are indicated for his back. The symptoms related to his back are to be blamed on degenerative changes of the lumbar spine, which are to be expected at his age. His right hip is not expected to be completely free of symptoms. He is going to have some residual pain and discomfort, which may become progressive to the point that he may need a revision of the right hip arthroplasty sometime in the future.

Although it certainly not clear why under the circumstances, the Commission appointed a designated doctor on March 31, 1993, to evaluate the claimant. The designated doctor determined that the claimant had not reached MMI.

The issues stated at the contested case hearing (they were expanded at the second hearing date) were whether the claimant's injury of (date of injury), extended to his back, whether the claimant had disability as a result of his injury on (date of injury), and if so, for what periods. Also issues at the hearing were whether and when the claimant reached MMI and what his IR is, and whether the claimant timely disputed the certification of MMI and IR of his treating doctor.

Although the hearing officer found that the claimant did not sustain an injury to his back on (date of injury), and his finding is sufficiently supported by the evidence of record, the determination that the claimant failed to timely dispute the MMI and IR certification of his treating doctor resulting in a final determination of MMI of April 20, 1992, with an eight percent whole body impairment rating effectively decides the case. We find that there is sufficient evidence in the record to support his finding and conclusion as to the claimant's failure to timely dispute Dr. T's certification. In this regard, the claimant at the hearing denied that he was sent a copy of or was aware of Dr. T's rating and somewhat expressed dissatisfaction with his attorney's representation in defending against the

untimely filing issue. On appeal, he now claims that his attorney's filing of an amended TWCC Form 41 and request for a "pre-hearing" was a dispute of the MMI and IR. In any event, there is nothing in the record to indicate that the attorney was not the representative of the claimant during the period September/October 1991 to October 22, 1992. We have previously observed, and note that we are in accord with Texas case authority, that an attorney employed to represent a claimant before the Commission is the agent of claimant and that the attorney's actions or inaction within the scope of his employment is attributable to the client. Texas Worker's Compensation Commission Appeal No. 93605, decided August 26, 1993, citing Texas Employers Insurance Association v. Wermske, 349 S.W.2d 90 (Tex. 1961). *See also* Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992. We are satisfied that there is sufficient evidence to show, as determined by the hearing officer that the claimant's attorney was mailed a copy of Dr. T's certification of MMI and IR on July 8, 1992, and that neither the claimant nor the attorney timely disputed Dr. T's certification of MMI or IR. Consequently, the MMI date of April 20, 1992, and the eight percent IR became final. We have held that MMI and IRs are tied together for the purposes of the application of the 90-day rule found in TWCC Rule 130.5(e) (Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993) and that the time runs when there is notice of or knowledge of the certification of MMI and IR. Texas Workers' Compensation Commission Appeal No. 93423 July 12, 1993.

We do not find merit to the claimant's remaining assertion of error. Under the circumstances of this case, there was no need for the appointment of a designated doctor since the certification of Dr. T became final for lack of a timely filed dispute. Although a designated doctor was gratuitously appointed, apparently since the issue of failure of timely notice had not yet been decided and was still in question, under the circumstance present, his report was not necessary and was not entitled to presumptive weight under the provisions of Section 408.125.

For the above reasons, the decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge